

Draft Antidegradation Implementation Procedures, August, 2009

July 16, 2019

Changes Required to be Consistent with Federal Regulation

1. III. Procedures for Review
 - A. Tier 1: In this section, the state needs to make clear that all water bodies are provided Tier 1 protection, even if they also have Tier 2 or Tier 3 protection. Existing uses need to be protected in all waters of the US.
2. III. Procedures for Review
 - B. Tier 2
Interagency Review and Public Participation: Under the 2015 revision of the federal water quality standards, the participation requirement has been increased for the water body-by-water body approach. Since Louisiana uses a hybrid approach, when the state determines which water bodies will receive Tier 2 protection utilizing the water body-by-water body approach, the state will need to describe their decision-making process and allow an opportunity for public involvement. This was addressed in the latest update to the state's WQS, but could be re-iterated here.

General Comments on the Draft Implementation Procedures

[Note: The following have been addressed in the recent WQS update, but need to be addressed here as well.]

1. For pollutants that are evaluated on the water body-by-water body basis, the implementation methods need to specify that a water body will not be denied Tier 2 protection solely because the water quality does not exceed levels necessary to support all of the CWA section 101(a)(2) uses. A water body that is not supporting a recreational use may still be supporting an aquatic life, with parameters that still have some assimilative capacity that could be protected.
2. When the water body-by-water body approach is used, the state needs to provide the details of how the decision was made to assign or not assign Tier 2 protection and the factors involved. In addition, the state needs to provide an opportunity for public involvement in the decision making process.
3. To be consistent with the revision of the federal WQS regulations, the state needs to specify either in its policy or implementation methods that if a practicable alternative is identified through the analysis of alternatives, that one of those alternatives must be implemented in order to allow for a lowering of high quality water.
4. The state should address how they will assure that thermal discharges are reviewed in a manner consistent with CWA section 316.

Changes Recommended to Make Antidegradation Requirements More Effective

If Louisiana decides to use this document as the basis for more comprehensive antidegradation implementation procedures, the EPA recommends that they consider the following comments while revising this document. The EPA strongly encourages Louisiana to finalize its antidegradation

implementation procedures so that its antidegradation policy can be effectively implemented and so that the public and regulated community understand how the antidegradation policy will be implemented.

1. III. Procedures for Review

A. Tier 1: The EPA recommends adding a sentence indicating that if an existing use is identified that is not currently a designated use, then the existing use will be added to the designated uses for that water body during the state's next triennial review process.

2. III. Procedures for Review

B. Tier 2

2. Existing Water Quality Data: Is the evaluation described in this section for conventional or toxic pollutants? It would be helpful to make it clear what methodology is used to determine whether a water body as a whole is considered high quality and what methodology is used to make a decision about whether an individual parameter is high quality.

3. III. Procedures for Review

B. Tier 2: To avoid confusion, the state may want to have a section under Tier 2 review that refers to conventional pollutants and then a section that refers to toxic pollutants. The way this document is currently structured makes it difficult to determine which methodologies apply to which type of pollutant. In addition, the state may also want to lay out steps that may be taken in determining whether a Tier 2 review is necessary.

For example:

1. Determine parameter of concern
2. If conventional pollutant, see if receiving water is on Tier 2 list
3. If on Tier 2 list, determine if 90% of the data is better than the criteria

And so on...

4. III. Procedures for Review

B. Tier 2

Tier 2 Review – Analysis of Social and Economic Benefits: A list of measurable changes is listed here for a limited number of parameters. How is a measurable change determined for other parameters such as pH, nutrients, and conductivity?

5. III. Procedures for Review

B. Tier 2

Components of a Tier 2 Review: The section above, "Tier 2 Review-Analysis of Social and Economic Benefits" is also a component of the Tier 2 review and should be included in this section, not in its own section.

6. III. Procedures for Review

B. Tier 2

Components of a Tier 2 Review: The implementation procedures state "If no alternatives to discharge are viable, a thorough explanation must be provided by the applicant." The state may want to provide a definition of "viable".

7. III. Procedures for Review

B. Tier 2

Interagency Review and Public Participation: This section provides language to be included in a public notice for a draft permit if a Tier 2 review was conducted, however this language does not provide specifics of the Tier 2 review and does not provide sufficient information for the public to understand what factors were considered during the review process. Permit writers should provide more detail in their fact sheets, including what specific alternatives were considered, if an alternative was selected, and the details of the socio-economic analysis. This increases the transparency of the process and allows the public to be fully informed about the Tier 2 process and have the ability to comment on the decision to allow degradation to high quality waters.

8. III. Procedures for Review

B. Tier 2

De Minimis Activities: This section states that the Department “may consider the discharge’s effect on both individual and cumulative assimilative capacity.” Please clarify the definitions of “individual” and “cumulative” assimilative capacity. Assimilative capacity is a property of the water body for each parameter, and when a *de minimis* exemption is being used the cumulative utilization of that assimilative capacity by all dischargers on that water body should be tracked and considered each time the state considers waiving Tier 2 review due to the *de minimis* exemption. A *de minimis* exemption should not be utilized without a cumulative cap, as this can lead to significant degradation within a water body without a Tier 2 review ever being performed.

9. III. Procedures for Review

B. Tier 2

De Minimis Determination Example: While providing an example is helpful for presenting how the state intends to utilize its *de minimis* exemption, this current example is unclear. The EPA would recommend creating an example that is based on a water quality based effluent limit rather than a technology based effluent limit and would also recommend discussing the assimilative capacity of the water body in terms of the concentration of the parameter within the water body and the criterion rather than as a load. These changes may make this example clearer to the reader.

10. III. Procedures for Review

B. Tier 2

Baseline Assimilative Capacity Calculation: The EPA strongly recommends that the State work on developing this methodology as soon as possible.

11. III. Procedure for Review

C. Tier 3: This section states that nonpoint source pollution may be considered sources of degradation for ONRWs. Does the state have a method by which it will address this degradation?

12. V. Nonpoint Source Management

Watershed Protection Programs: The EPA suggests including information about TMDLs in another document in order to avoid confusion over which watershed management tools are utilized by which program. As antidegradation is a separate process from TMDLs, it is best to speak about them separately. If the state would like to retain its discussion

about TMDLs, the EPA recommends creating a clear distinction between antidegradation requirements and TMDLs.

13. VI. Section 401 Certifications: This section starts off with the sentence “An applicant seeking a Federal license or permit for an activity involving a discharge of fill material into navigable waters is required to obtain a certification from the state affected by the activity.” This can be a bit misleading, as 401 certification can be required for other federal licenses or permits, not just 404 permits. The EPA would recommend revising this sentence and section to reflect all the potential licenses and permits that could require a 401 certification rather than solely focusing on 404 permits.
14. VII. Water Quality Enforcement Activities: The EPA recommends moving this section into another document as enforcement activities are not linked to the antidegradation process.
15. Appendix B: For table 1, is the data analysis that is referred to in the title for toxins or conventional pollutants? Or is it for all pollutants?

General Comments on the Draft Implementation Procedures

16. The State may want to describe more clearly which activities will trigger an antidegradation review (e.g. 402 permits, 404 permits, and 401 certifications). In addition, if any nonpoint source activities trigger antidegradation, it would be helpful to include that in the implementation document as well.
17. The State may want to describe how during a Tier 2 review it is assured that the highest statutory and regulatory requirements shall be achieved for all existing point sources and best management practices for nonpoint sources.
18. The State may want to develop a process to allow the public to independently request a Tier 3 designation for a water body.
19. The EPA encourages the State to consider the use of *de minimis* in light of recent case law. A comprehensive discussion of the use of *de minimis* is included in the preamble of the 2015 Federal WQS Regulation revisions. This discussion can be found on page 51034 and the document can be found here: <https://www.gpo.gov/fdsys/pkg/FR-2015-08-21/pdf/2015-19821.pdf>.
20. The State has already addressed several important elements of antidegradation implementation in their draft implementation procedures. The EPA recommends retaining them when the document is finalized. They include:
 - a. How Tier 1 protection will be implemented
 - b. How high quality waters will be identified
 - c. How the water body-by water body and parameter-by-parameter approaches will be implemented for conventional and toxic pollutants, respectively. Additional details could be added to this element to provide greater clarity.
 - d. The specification that the state is the responsible party for making the decision about whether a lowering of high water quality is necessary and important
 - e. The analysis of alternatives that is described on pages 6-7
 - f. Description of questions to ask related to the socio-economic analysis
 - g. Description of the short-term degradation allowed in ONRWs